Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07318/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision and Reasons Promulgated**
On 20 November 2015	**On 11 December 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

AYK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Andrew Joseph, Counsel, instructed by Wick and Co.
For the Respondent: Mr Irwin Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make the order because the appellant is an asylum seeker who might be at risk just by reason of being identified.

2. The appellant appeals against the decision of the First-tier Tribunal dismissing the appellant's appeal on asylum and human rights grounds

against a decision taken on 4 September 2014 refusing to grant him asylum and to remove him to Eritrea.

Introduction

3. The appellant is a citizen of Eritrea born in 1985. He claims that he is a Pentecostal Christian and was arrested and detained on 7 August 2012 after being caught at a Pentecostal gathering. He then escaped from detention on 20 October 2012 and left Eritrea for Sudan by car and on foot on 29 October 2012. His family helped him to pay $3000 to leave. He was taken to the British embassy in Khartoum to apply for a visa. He does not know whether the passport used was forged or a genuine passport obtained in the appellant's identity through the use of bribery. The respondent confirms that the appellant applied for a student visa unsuccessfully on 21 May 2013 and successfully on 1 October 2013. He arrived in the UK by air on 28 October 2013, claiming that the agent kept his passport. He claimed asylum on 29 November 2013.

4. The respondent accepted identity and nationality but decided that to obtain an Eritrean passport the appellant would have to be either working for the government or requiring a student visa on grounds of education. The respondent did not accept that the passport and student visa were forged documents. The respondent did not accept that the appellant would have been issued with a passport on 12 December 2012 if he was wanted in Eritrea as a Pentecostal Christian. The respondent rejected the appellant's claim to be a Pentecostal Christian or that he was detained, escaped detention and left Eritrea illegally.

The Appeal

5. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Newport on 22 December 2014. The judge found that the appellant's evidence regarding his escape was extraordinarily vague and that he had not established that he left Eritrea illegally or that the passport that he obtained in Sudan was not properly issued to him. He was not telling the truth about how he obtained the passport. He was able to travel on an original and valid passport and therefore fell into a category of person to whom the Eritrean authorities were prepared to afford passport facilities and he was not at any real risk on return.

6. The judge found that the letter dated 26 October 2014 from Pastor Simon Kabede ("the pastor's letter") had little weight in the absence of the pastor to give evidence but gave positive weight to the oral evidence from YH and MK who stated that the appellant was genuinely a Pentecostal Christian. The judge also accepted that the appellant's ability to answer questions about the Pentecostal faith during his asylum interview gave rise to no apparent discrepancies. Nonetheless, the judge attached little weight to the appellant's assertion in respect of his past or current religious convictions. His attendance at a Pentecostal Church in the UK added little weight to his appeal even supported as it was by the evidence of the witnesses who attested to his commitment and sincerity.

The Appeal to the Upper Tribunal

7. The appellant sought permission to appeal on the basis that the judge had failed to make any findings in relation to the appellant's national service and whether as a result he would be at risk as a deserter. The appellant had been called for further military service in 2012 whilst being employed as a statistician for the Ministry of Defence in his capacity as a national service recruit. The judge also failed to give adequate reasons for discounting the independent witness evidence about the appellant's commitment and sincerity in his church attendance in the UK. The refusal to accept that the pastor was unable to attend on 22 December; 3 days before Christmas was also considered unreasonable.

8. Permission to appeal was granted by Upper Tribunal Judge Reeds on 15 May 2015 on the basis that it was arguable that the judge failed to give reasons why she rejected his account of his practice of the Pentecostal faith in the UK. It was open to the judge to reach the conclusion that she did in respect of the pastor's attendance. It was also arguable that the judge did not consider the appellant's account of having deserted from national service when considering risk on return.

9. In a rule 24 response dated 12 June 2015, the respondent sought to uphold the judge's decision on the basis that the judge properly considered the evidence of the two witnesses in respect of the appellant's faith. The judge properly recorded that it was part of the appellant's case that he was at risk on return for illegal exit and draft evasion. The expert report did not provide any basis to depart from the substantial assessment of MO (illegal exit – risk on return) Eritrea CG [2011] UKUT 00190.

10. Thus, the appeal came before me.

Discussion

11. Mr Joseph submitted that the headline point was illegal exit. The judge confused the passport with an exit visa and the reasoning is thus fundamentally flawed. Paragraph 20 of MO applies. Even if the appellant had a valid passport that does not reduce risk on return. Paragraph 96 of MO states that it is possible to obtain a passport in Sudan but that does not establish anything either way about exit visas. The judge found both witnesses as to Pentecostal faith credible and there were no arguable grounds to dismiss the appeal. Practising the Pentecostal faith in the UK would be a risk factor in Eritrea but that was not addressed by the judge. The appellant was under the control of the agent when he arrived in the UK and the one month delay in claiming asylum does not reduce the risk factors on return. The appellant arrived with an 18 month student visa valid from 30 May 2013 to 28 February 2015.

12. Mr Richards submitted in reply that the decision was not flawed and the judge considered all of the evidence before reaching conclusions. The appellant left Eritrea legally with his own passport that was issued in

Eritrea and he had a visa to come to the UK. The appellant had to prove that he left illegally. He could have done that by producing his passport without an exit visa but he has instead disposed of his passport. The judge was entitled to find at paragraph 33 of the decision that the appellant did not leave Eritrea illegally. The judge was also entitled to find that attendance at a Pentecostal church in the UK did not add weight to the claim. The judge did take the witness evidence into account but the appellant still failed to reach the low evidential standard. The decision should stand.

13. Mr Joseph further submitted that the appellant said that he came to the UK with the agent who took the passport off him. The premise in paragraph 35 is flawed because the issue of obtaining a passport is not the same as obtaining an exit visa. The appellant's account is wholly consistent with the objective evidence because he was issued with the passport in Sudan. The judge failed to engage with the categories in MO – those in the appellant's category almost inevitable have left illegally. The procedure to obtain an exit visa is set out in paragraph 20 of MO and the passport would not have had an exit visa. There were two applications for a student visa and it would be highly unusual if the appellant had been granted an exit visa.

14. I find that the key paragraphs of MO are 113-116 which I set out in full;

"113. Nevertheless, we do think the evidence now before us does require us to be less ready to conclude that non-credible Eritreans who left Eritrea after August/ September 2008 did so lawfully. Put another way, we do consider that this evidence is now sufficiently strong in most cases to counteract negative credibility findings in relation to an appellant's evidence (see MA (Somalia) para 33). We regard August/ September 2008 as the turning point because there is credible evidence indicating that that was the point in time when the Eritrean authorities, angered by the growing number of cases of persons who had been granted exit visas who had then failed to return, decided to put their foot down by suspending exit visa facilities. (We put the date at August/September to reflect the fact that some reports, e.g. the US State Department report for 2008, locate the date of this suspension as being August). We are aware that the British Embassy, Asmara letter of 22 February 2011 seeks to cast doubt on whether there was ever such a suspension. However, we note that Professor Kibreab's evidence that there was such a suspension is supported by several other sources, in particular UNHCR, the US State Department report for 2008 and the Aswate.com website, which the Tribunal in MA at para 336 found reliable, noting that it was described by Dr Pool (another expert in that case on whom that Tribunal found they could place reliance) as independent of opposition political parties and although critical of the Eritrean Government, one that he found:

> "… to be one of the most reliable because it is rare to see a website that corrects itself if subsequently proven to be wrong on factual errors and it is a website on which the Home Office often relies, indeed it is exemplified by the fact that it is quoted in this COI".

114. It is true that Professor Kibreab's evidence is also that since that suspension the exit visa facility has re-opened, but it is also that it has done so on a more limited basis.

115. We appreciate that in the context of a case in which the decision-maker has found a claimant/appellant wholly lacking in credibility (save in relation to sex and perhaps age and/or date of departure from Eritrea and health), it is difficult to see any basis for finding conclusively that they would not fall within one of the above two categories (highly trusted government officials and their families or those who are themselves members of the military or political leadership; members of ministerial staff recommended by the department to attend studies abroad). But at least in a range of cases the evidence may be such as to make it clear that the claimant concerned, albeit wholly or largely lacking in credibility, could not have any links with government officials or the regime's inner circle and could not have an education or skills profile making it likely they have been civil servants or have an educational bent (e.g. if they are found to come from a rural part of Eritrea and have had no secondary schooling). What may be involved here sometimes is clearer recognition by the decision-maker that when finding a claimant wholly incredible they are not in fact meaning that they lack credibility in every conceivable particular, since they may in fact accept, for example, that they are from a rural background and lack education.

116. The general position concerning illegal exit remains, therefore, as expressed in MA, namely that illegal exit by a person of or approaching draft age and not medically unfit cannot be assumed if they had been found wholly incredible. However, if such a person is found to have left Eritrea on or after August/September 2008, it may be that inferences can be drawn from uncontentious personal data recorded on an appellant as to their level of education or their skills profile as to whether legal exit was feasible."

15. In this appeal, the judge found at paragraph 35 of the decision that the appellant had not established that he left Eritrea illegally or that the passport he obtained in Sudan was not properly issued to him. However, the appellant had already left Eritrea by the time he arrived in Sudan and there is no analysis as to how the appellant fell into the limited category of Eritreans who might be issued with an exit visa. The judge found at paragraph 38 of the decision that the appellant fell into a category of person to whom the Eritrean authorities are prepared to afford passport facilities but that is not the same thing as an exit visa.

16. In addition, the judge has not made findings about the appellant's national service. The appellant's evidence was that he was still subject to national service which raises the risk that he will be treated as a deserter on return. That risk is not addressed in the decision.

17. Taking those matters as a whole, I find that the decision to dismiss the appellant's appeal involved the making of a material error of law and the decision cannot stand. I have not found it necessary to make findings in

relation to the Pentecostal faith issue although it will clearly be important to the appellant to call evidence from a pastor at the re-hearing. The judge was entitled to give little weight to the pastor's letter.

Decision

18. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.

19. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge.

Signed  Date 1 December 2015

Judge Archer

Deputy Judge of the Upper Tribunal